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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942.

No. 236

UNITED STATES OF AMERICA ON THE RELATION OF SAMUEL OSTRAGER AND SAMUEL OSTRAGER IN HIS OWN BEHALF

versus

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ORIGINAL BRIEF IN BEHALF OF RESPONDENTS.

EBERHARD P. DEUTSCH,
Attorney for Respondents.

R. EMMETT KERRIGAN,
DEUTSCH, KERRIGAN & STILES,
Of Counsel.

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NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., ET AL.

ORIGINAL BRIEF IN BEHALF OF RESPONDENTS.

May It Please the Court:

STATEMENT OF THE CASE.

This action is alleged in the complaint to have been brought under Sections 231 to 235 of Title 31 of the United States Code [R. 2]. In substance, it is based on the allegations that defendant contractors by agreement added certain estimating costs (not alleged to have been excessive) to their respective bids for the construction of the foundation of the Charity Hospital in New Orleans, which was financed in part out of appropriations made by the Federal Emergency Administration of Public Works, and

that the successful bidder returned to the other defendants such estimating costs. The complaint was filed less than two months after the termination of an indictment [R. 25, et seq] consisting of two counts against defendants based on the foregoing transaction. The first count charged defendants with having conspired to defraud the United States in violation of Section 88 of Title 18 of the United States Code; and the second charged defendants with having defrauded the United States by diverting monies allocated out of the Emergency Relief Appropriation Act of 1935, and appropriations supplemental thereto. The first count had been nol prossed and defendants had pleaded *nolo contendere* to the second and had been fined. [R. 59, et seq.]. Paragraph 13 of the complaint [R. 8] is practically a verbatim copy of the substance of count 2 of the indictment [R. 36, 37], indicating that the present action resulted from and is based on the same facts alleged in the indictment.

Defendants filed an answer denying any illegality in the transaction complained of and alleging that such practice was well known, even by the Board of Administrators of the Charity Hospital and its architects.(1)

(1) Defendants in no manner concede the alleged illegality of the practice in question. It is not contended by petitioner, and the complaint does not allege, that the estimating charges were excessive or that there was any agreement or so-called collusion with respect to the final bids submitted by defendants. A service was rendered to the Charity Hospital by each of the contractors who submitted a bid, because each of them was bidding against the other and the probability of the Charity Hospital's obtaining the lowest possible bid was increased by the number of contractors who submitted bids. If a contractor is not reimbursed his estimating charges by the particular work on which the bid is submitted, these charges must be included in bids on subsequent works. It seems proper and fair that each job should bear its own estimating charges, that is, those of all contractors who are furnished plans and specifications and invited to bid thereon. The owner for whom the work is done can limit these charges simply by allowing only a certain number of contractors to submit bids.

Defendants also filed two special defenses, the first being that the complaint failed to state a claim against defendants upon which relief could be granted, and the second that defendants were, contrary to the Fifth Amendment, being twice put in jeopardy for the same offense. These special defenses were brought up for hearing in advance of the trial on the merits. The district court overruled the first defense, without giving any reason for so doing, but maintained the second defense and dismissed the action [R. 81, et seq.]. On appeal the Circuit Court of Appeals affirmed the judgment of the district court, basing its decision primarily on the first defense [R. 114, et seq.]. On petition to this Court certiorari has been granted. No brief has been filed by petitioner.

FAILURE TO STATE A CAUSE OF ACTION.

(a)

As heretofore stated, the complaint alleges that this action is brought under Sections 231, *et seq.* of Title 31 of the United States Code. Apparently when the action was filed petitioner was proceeding under the erroneous provisions of Section 231 of that Title. That Section erroneously provides that a recovery may be had for the commission of acts "prohibited by any of the provisions of Section 80 of Title 18". Section 231 of Title 31 originally was Section 3490 of the Revised Statutes, which provides for the recovery through informers of penalties and forfeitures for the making of false claims against the United States in violation of Section 5438 of the Revised Statutes. When Section 3490 was incorporated into the United States Code in 1926, its reference to Section 5438 was changed by the compilers to read "Section 80 of Title 18", which in-

cluded broad amendments to Section 5438 enacted later than Section 3490.(2) The uniform interpretation of these Sections by the federal courts is to the effect that the informer statute applies only to those offenses which were included within the scope of Section 5438 at the time of its enactment, and may not be extended to include offenses brought within that Section(3) by later amendments.(4)

Inasmuch as petitioner is not entitled to the benefit of the broad provisions of Section 80 of Title 18 of the United States Code, he now contends that the facts alleged in his complaint fall within the narrow provisions of Section 5438 of the Revised Statutes. In this connection it must be borne in mind that informer statutes have been construed with utmost strictness and that informers wishing to recover must adhere to the exact language of the statute.(5)

The pertinent provisions of Section 5438 are as follows;

> "Every person who makes . . . or presents . . . for payment or approval . . . any claim upon or against the Government . . . knowing such claim to be false . . . or who, for the purpose of obtain-

(2) Olson v. Mellon, 4 FS (DC Penna.—1933) 947, aff'd. sub. nom., U. S. ex rel Knight v. Mellon, 71 F2d (CCA 3—1934) 1021; cert. den., 293 US 615.

(3) 18 USC 80.

(4) Olson v. Mellon, supra. See also: United States ex rel Kessler v. Mercur Corporation, 83 F2d (CCA 2—1936) 178, cert. den., 299 US 576; United States v. McMurtry, 5 FS (DC Ky.—1933) 515. To the same effect is an unreported opinion of Judge Knox in the Eastern District of New York: United States v. American Cotton Co-operative Association, L 58/272, May 20, 1935.

(5) Hurst, The Common Informer, 147 Contemporary Review 189, 190; Ferrett v. Atwell, 8 Fed. Cas. No. 4747. Cf. U. S. v. Kansas Pac. Ry. Co., 26 Fed. Cas. No. 15,506; U. S. v. Shapleigh, 54 Fed. (CCA 8—1893) 126.

> ing . . . the payment or approval of such claim, makes . . . any false . . . claim . . . knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government . . . by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim," shall be imprisoned, etc.

The essence of the offense denounced by the foregoing section is the making or presenting of any false or fraudulent "claim upon or against the Government". Unless a complaint charges presentation of such a claim to the Government for payment or approval, no offense is charged under Section 5438, and there is no basis for recovery by an informer under Section 3490. This was conceded by petitioner throughout his brief in the Circuit Court of Appeals,(6) although some attempt has been made to supplement that position in his petition filed for certiorari.

In affirming the judgment of the district court, the Circuit Court of Appeals expressly found that "no allegation is made in this complaint that a claim had been or could be made by the defendants against the government". [R. 118]. An examination of the complaint will disclose the correctness of this finding.

The only allegations of fact set forth in the complaint are those contained in the first fourteen paragraphs thereof [R. 2-10]. A most careful examination of those allegations will disclose that it is not alleged therein that defendants asserted a claim against the Government.

(6) See, for example, pages 15 and 17 of petitioner's opening brief in the Circuit Court of Appeals.

Paragraph 13 of the complaint [R. 8] in effect contains the substance of the demand. The substantial allegations thereof are a verbatim copy of Count 2 of the indictment [R. 35-36], to which defendants pleaded *nolo contendere*. It was conceded(7) by petitioner in his brief in the Circuit Court of Appeals that the indictment did not allege in either count and was not based upon the presentation of a false claim against the Government, and that such an allegation is necessary to maintain the present action. Inasmuch as no such claim was made in the indictment, it follows that no such claim is made in that part of the complaint which is practically a verbatim copy thereof.

In an effort to support the contention that the necessary allegation of the assertion of a false claim against the Government is contained in the complaint, petitioner quoted(8) in his petition for certiorari a *portion* of paragraph 15 [R. 10] of the complaint, which is the concluding paragraph thereof. However, an examination of that paragraph will show that no additional facts are set forth therein. The allegations thereof are simply conclusions of law expressly based upon the preceding allegations of fact. Thus, the conclusions alleged in that paragraph are prefaced with the following statement which is omitted from the quotation in the petition for certiorari:

> "That pursuant to the aforesaid conspiracy and in furtherance thereof, all of the aforesaid defendants *through the fraudulent and unlawful conduct hereinbefore described, did* . . . " [R. 10].

(7) P. 15 of petitioner's opening brief in the Circuit Court of Appeals.

(8) Pages 12-13, petition for certiorari.

Although the motion under discussion admits well pleaded facts, it does not admit averments of the pleader's conclusions.(9) But even if the conclusions of the pleader in paragraph 15 of the complaint are to be given effect, the requisite allegation of a false claim against the Government cannot be found therein. Although those conclusions state that defendants "did falsely and fraudulently receive from the United States Government large sums of money", and that defendants had committed various acts "for the purpose and with the intent of cheating and defrauding the Government of the United States", no allegation is made that any false claim was asserted against the Government.

It may be contended that the requisite allegation is found in the following portion of paragraph 15: "did falsely and fraudulently submit bids in furtherance of said conspiracy, did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, did submit false and fraudulent written claims for payment thereof". But these allegations obviously refer to the construction contract with the Board of Administrators of the Charity Hospital referred to in paragraph 9 [R. 6] of the complaint. As will be pointed out hereinafter, claims made under this contract with the Board of Administrators did not constitute claims against the Government.

(9) Newport News, etc. Co. v. Schauffler, 303 U. S. 54; Nortz v. United States, 294 U. S. 317; St. Louis, K. & S. E. R. Co., v. United States, 267 U. S. 346; United States ex rel Salzman v. Salant, 41 F. S. (DC NY—1938) 196.

It was asserted(10) in the petition for certiorari herein that the Circuit Court of Appeals departed from the record in arriving at its decision, and a portion of the Court's opinion is quoted in support of this assertion. Apparently this contention refers to the Court's statement that the contract for the construction in question was entered into with the Board of Administrators of the Charity Hospital, and that the successful bidder had no contract with the United States. This statement is in absolute keeping with the allegations of the complaint and with the theory on which the case has been prosecuted in the two courts below. The complaint clearly set forth that the bids for the work were submitted to the Board of Administrators and that the contract therefor was with such board. The allegations that the project "was financed in part" by the Federal Emergency Administration of Public Works and that the grant to the Board of Administrators was "for the purpose of aiding said project," do not set forth that the bids were submitted to, or the contract for the work was executed with, the Government. These allegations simply show that the Government partially financed the cost of the work.

Even if the complaint alleged that the construction contract was obtained through fraudulent representations, such allegation would not state a cause of action within the provisions of Section 5438 of the Revised Statutes. The recent case of *Mandel v. Cooper Corporation*,(11) has clearly held that such a transaction, even with the United

(10) Pages 18-19.

(11) 42 FS (DC NY—1941) 317.

States itself, does not constitute the making of a fraudulent claim within the informer statute.

A claim against the United States means "a right to demand money from the United States".(12) In *United States v. Cohn*,(13) this Court, in passing on Section 5438, said:

> ". . . it is clear, in the light of the entire context, that in the present statute, the provision relating to the payment or approval of a 'claim upon or against' the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, *based upon the Government's own liability to the claimant.*" (Italics supplied).

The present complaint does not allege liability of the Government for the amount due under the construction contract, nor is there any allegation that the Government was liable to the successful bidder or to any of the defendants. There being no such alleged liability and no right of defendants to demand any amount under the construction contract, or otherwise, from the Government, and there being no allegation that any claim was asserted by defendants against the Government, this action is not authorized by the informer statute, and the decision of the Circuit Court of Appeals so holding, is correct.

All of the authorities cited by petitioner were cases involving criminal prosecutions under sections of the crim-

(12) Hobbs v. McLean, 117 U. S. 567, 575; Words & Phrases, Vol. 7, 392. See also: United States ex rel. Kessler v. Mercur Corp., supra; United States ex rel. Salzman v. Salant, supra; United States v. American Cotton Cooperative Ass'n., supra.

(13) 270 U. S. 339, cited with approval in United States v. Kapp, 302 U. S. 214. Also see: Mookini v. United States, 95 F2d (CCA 9—1938) 960; United States ex rel. McMurtry, supra, and cases cited in the preceding footnote.

inal code imposing penalties for *defrauding* the United States.(14) These cases are based primarily on the decisions of this Court giving a broad interpretation to such statutes.(15)

Petitioner's contention, not urged in either of the courts below, that the second and third clauses of Section 5438 are broad enough to include the claim asserted in the complaint, is indeed novel, never before having been asserted in the many years the statute has been in force, and is without foundation.

The contention with respect to the second clause of the statute is based on the allegations in paragraph 14 of the complaint [R. 9-10] with reference to the execution of certificates by defendants at the time they submitted their respective bids to the Board of Administrators of the Charity Hospital. Although the allegations of this paragraph were denied in the answer [R. 17] they must be taken for true under the motion under consideration.

A fair interpretation of the alleged certificates should not render them false under the circumstances. But even if the certificates should be declared false under the allegations of the complaint, it is not alleged that they

(14) Madden v. United States, 80 F2d (CCA 1—1935) 672, cert. den., 297 U. S. 710; Langer v. United States, 76 F2d (CCA 8—1935) 817; United States v. Harding, 81 F2d (Ct. Ap. DC—1936) 563.

(15) "It is not necessary that the government shall be subjected to property or pecuniary loss by the frauds, but only that its legitimate official action and purpose shall be defeated by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention." Hammerschmidt v. United States, 265 U. S. 182, 188; See also Haas v. Henkel, 216 U. S. 462.

were used "for the purpose of obtaining or aiding to obtain the payment or approval" of a "false, fictitious or fraudulent" claim "upon or against the Government of the United States" as required by the second clause of the statute. Paragraph 14 of the complaint merely alleges that these certificates were made "for the purpose and with the intent of cheating and defrauding the Government of the United States."

If it is petitioner's contention that the certificates were executed for the purpose of obtaining payment of a "claim" of the Board of Administrators of the Charity Hospital against the United States, the contention is groundless because there is no allegation that any such claim of the Board of Administrators was "false, fictitious or fraudulent".

With respect to the third clause of the statute, it is quite obvious that the "false or fraudulent claim" referred to therein is one upon or against the United States, as are the other claims previously referred to in the statute. All of the cases dealing with the statute have held or indicated that an informer can recover only in the event a false claim is asserted against the Government. Petitioner's contention with respect to this clause of the statute appears to be an afterthought.(16)

(16) "The indictment does not allege in either count and is not based upon the presentation of a false claim for payment or approval against the United States Government or an agency thereof. Such an allegation is necessary, however, to maintain a cause of action under 31 U.S.C.A. 231 (R. S. 3490) which incorporates Sections 80 and 83 (R. S. 5438) of Title 18, U.S.C.A., insofar as the enumerated offenses are concerned." P. 15 of petitioner's opening brief in the Circuit Court of Appeals.

As heretofore pointed out, the complaint is expressly based on Section 80 of Title 18 of the United States Code(17) which contains broad amendments to the original Section 5438 of the Revised Statutes. While the provisions of Section 80 may be broad enough to allow a prosecution under the circumstances alleged in the complaint, those broad provisions are not applicable to the informer statute, and petitioner must bring his action within the narrow provisions of Section 5438, as originally enacted, which he has failed to do.

(b)

The complaint fails to show that petitioner has obtained the authority of the Commissioner of Internal Revenue for the institution of this action. Section 3214 of the Revised Statutes requires the Commissioner's authority for commencement of a suit "for the recovery of taxes, or of any fine, penalty or forfeiture". The same section further provides "That in case of any suit for penalties or forfeitures brought upon information received from any person other than a collector or deputy collector, the United States shall not be subject to any costs of suit."

The preceding Section 3213 provides that "All suits for fines, penalties and forfeitures where not otherwise provided for, shall be brought in the name of the United States, in any proper form of action, or by any appropriate form of proceeding, *qui tam* or otherwise . . .". These provisions of Section 3213, together with those of Section 3214, above quoted, indicate that the authorization of the

(17) 18 U.S.C. 80.

Commissioner of Internal Revenue is required not only for the institution of a suit for the recovery of taxes but also for any penalty or forfeiture due under the informer statute. Such a conclusion was reached in the case of *Olson v. Mellon, supra.*(18)

DOUBLE JEOPARDY.

If the first defense is not maintained, it is submitted that the defense of double jeopardy must of necessity be maintained because the offense here charged is the same as that contained in count 2 of the indictment on which defendants were fined, and because the sanction sought to be imposed is a criminal one.

There does not seem to be any question but that the offense charged in the complaint and that charged in the second count of the indictment, on which defendants were punished, are the same. As heretofore pointed out, paragraph 13 of the complaint, which contains the substance of petitioner's action, is practically a verbatim copy of count 2 of the indictment. [R. 36]. As stated succinctly by the district judge in his opinion, the "offense alleged in the complaint and that alleged in the second count of the indictment are really one and the same; that is, that the United States was defrauded by additions made to the bids for the construction of the foundation of the Charity Hospital". [R. 83]. It seems quite clear that the facts alleged in count 2 of the indictment and which could

(18) "We know of no rule in relation to the construction of statutes which takes the instant cases out of the purview of Section 3214 Rev. St." Olson v. Mellon, supra, at p. 950.

have been proved thereunder are the same as those set forth in the complaint and which could be proved thereunder.(19)

The double jeopardy clause of the Constitution protects the imposition of more than one criminal sanction for the same act or omission.(20) There is no prohibition against the imposition of both criminal and civil sanctions for the same act. The question of whether a criminal or a civil sanction is sought to be imposed is entirely one of statutory construction.(21)

In *Helvering v. Mitchell, supra*, the Court found that the intention of Congress to impose a civil sanction by imposing "additions" to the income tax was made clear by the express language of the statute under consideration. The Court pointed out that under the statute the additions as well as the tax itself could be collected by distraint or by a proceeding in court. This provision of the statute would have been unconstitutional if the sanction in question had been a criminal one because Congress may not provide civil procedure for the enforcement of punitive sanctions. Inasmuch as the court was bound to give a constitutional interpretation to the statute if possible(22), it was required

(19) "We are, therefore, of opinion that if the specific acts of removal on which this suit is brought are the same which were proved in the indictment, the former judgment and conviction is a bar to the present action. . . ." United States v. McKee, 26 Fed. Cas. (CC Mo.—1877) 116, No. 15688; cited with approval in Coffey v. United States, 116 U. S. 436, and U. S. v. LaFranca, 282 U. S. 568.

(20) Helvering v. Mitchell, 303 U. S. 391.

(21) Helvering v. Mitchell, supra; Murphy v. United States, 272 U. S. 630,

(22) Cf. United States v. LaFranca, supra.

to hold that Congress intended merely a civil sanction. Thus the Court said:

> "If the section provided a criminal sanction, the provision for a collection by distraint would make it unconstitutional. . . . That Congress provided a distinctly civil procedure for the collection of the additional fifty per centum indicates clearly that it intended a civil, not a criminal sanction."

In addition to the foregoing provisions of the statute, the Court pointed out that the addition to the tax was not included in the part of the act headed "Penalties" but in the part headed "Additions to the Tax". The Court also pointed out that included under the latter heading were other sections, one providing for "25 per centum addition for failure to make and file a return"; another providing for "interest at the rate of 6 per cent. upon the deficiency from the date prescribed for payment of the tax," etc. After making these observations, the Court concluded:

> "Obviously all of these 'Additions to the Tax' were intended by Congress as civil incidents of the assessment and collection of the income tax."

In the instant case there is no provision of the statute which must be interpreted as applying a civil sanction in order to save its constitutionality, nor is the penalty prescribed clearly denominated as a civil sanction. The statute clearly provides for punishment, and it has so been interpreted.

Thus, in *United States v. Shapleigh*,(23) the court said that under the statute "the Government sought to

(23) 54 F. 126.

punish this defendant" and that the proceeding thereunder was "*criminal in its . . . purpose*". In *Olson v. Mellon, supra*, the court said that "The statute is *plainly penal* in its nature. . .". Although the statute considered in *United States v. LaFranca, supra*, was not the one now under consideration, the language used by the Court there is significant:(24)

> "But an action to recover a penalty for an act declared to be a crime is, in its nature, *a punitive proceeding*, although it take the form of a civil action; and the word 'prosecution' is not inapt to describe such an action." (Italics supplied).

Section 3492, which is the third section of the informer statute, provides as follows:

> "And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of two thousand dollars, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit."

The foregoing is indeed an expression of Congress that the purpose of the statute is to punish. It would seem quite clear that one would not be "held to bail" in a proceeding to enforce a mere civil sanction.

Inasmuch as there is no clear indication in the statute of the intention of Congress to impose a civil sanction, the express provisions of the statute and the interpretations thereof and of similar statutes should lead to the conclusion that a criminal and not a civil sanction was intended thereunder. Such being the case, the plea of

(24) Cf. Coffey v. United States, supra.

double jeopardy must be sustained in the event the first defense is overruled. The fact that the defendants in the instant case were not actually tried but simply were fined on pleas of *nolo contendere* does not alter the rule.(25)

CONCLUSION.

On the basis of the foregoing reasons and authorities, defendants respectfully urge that the judgment be affirmed.

Respectfully submitted,

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(25) United States v. Chouteau, 102 U. S. 603, cited with approval in United States v. LaFranca, supra; United States v. Glidden Co., 78 F2d (CCA 6—1935) 639, cert. den., 296 U. S. 652.

SUPREME COURT OF THE UNITED STATES.

No. 236.—October Term, 1942.

United States of America on the Relation of Samuel Ostrager and Samuel Ostrager in his own behalf, Petitioners,
vs.
New Orleans Chapter, Associated General Contractors of America, Inc., et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 18, 1943.]

Mr. Justice Black delivered the opinion of the Court.

This action is substantially similar to that in *United States ex rel. Marcus* v. *Hess*, — U. S. —, decided this day. Relying on §§ 5438 and 3490-93, Revised Statutes, the petitioner charges that the respondents caused the government $7,620 damages by submitting fraudulent collusive bids on a hospital constructed with Federal Public Works Administration financial assistance. The petitioner in a qui tam action asks double damages plus $2,000 from each of seventeen respondents. The respondents had previously been indicted by the United States government in a criminal action and had paid fines totalling $5,000.

The respondents answered on the merits, made other pleadings not relevant at this stage of the case, and offered two special defenses: that the action placed them in double jeopardy in violation of the Fifth Amendment and that the statutes involved did not provide a basis for such a cause of action. The district court, without reaching the merits, dismissed the complaint on the theory of double jeopardy. The Circuit Court of Appeals affirmed the dismissal of the complaint but rested its conclusion on the belief that no claim against the United States was involved since the United States was not a party to the contract. It relied heavily on the *Hess* case as decided by the Circuit Court.

For the reasons set forth in our opinion in the *Hess* case, we believe that the decision below should be reversed.

It is so ordered.

Mr. Justice Frankfurter joins in this opinion but concurs on the question of double jeopardy for the reasons set forth in his opinion in No. 173, *United States ex rel. Marcus* v. *Hess*. Mr. Justice Jackson dissents for the reasons set forth in his opinion in the same case.

Mr. Justice Murphy took no part in the consideration or disposition of this case.